Supreme Court, U.S.
FILED
OCT 9 1997
CLERK

No. 97-405

In The

Supreme Court of the United States

October Term, 1996

THE ROMAN CATHOLIC DIOCESE OF BROOKLYN,

Petitioner,

vs.

KENNETH R., by his mother and natural guardian, DIANA R., KEVIN R., by his mother and natural guardian, DIANA R., BERNARD R., by his mother and natural guardian, LOURDES R., DIANA R. and LOURDES R. (anonymous),

Respondents.

On a Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department.

RESPONDENTS' BRIEF IN OPPOSITION

KENNETH LITWACK
Counsel of Record
42-40 Bell Blvd.
Bayside, N.Y. 11361
(718) 428 4806

Counsel for Respondents

PARTIES TO THE PROCEEDING

The petition does not accurately list the parties to the proceeding. While only The Roman Catholic Diocese of Brooklyn has pursued an appeal, the proceeding in the lower court is a consolidated proceeding involving the following parties: plaintiffs-respondents as listed in the caption; The Roman Catholic Diocese of Brooklyn, *defendant-petitioner*, Our Lady of Sorrows Church, Inc., *defendant*, St. Leo's Church, Inc., *defendant*, The Roman Catholic Archdiocese of Merida, Venezuela, *defendant*, Baltazar Porras Cardoza, Archbishop of Merida, Venezuela, *defendant*. Both The Roman Catholic Archdiocese of Merida, Venezuela, and Baltazar Porras Cardoza, Archbishop of Merida, Venezuela have defaulted in the action. As petitioner noted in its list of parties defendant Enrique Diaz Jimenez has also defaulted.

TABLE OF CONTENTS

Parties to the Proceeding	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	1
Reasons for Denying the Writ	3
A. Petitioner has not exhausted its remedies in State court and the interlocutory order of the Appellate Division, Second Department is not final in State or Federal Terms.	3
B. There is no conflict among the states on the question of the constitutionality of negligent supervision or retention.	5
C. Plaintiffs-Respondents Negligent Supervision claim relies upon rules of law which are neutral and of general application.	8
Conclusion	9

Contents

TABLE OF AUTHORITIES

CASES

Byrd v Faber, 565 N.E.2d 584 (Ohio 1991).....6

Clark v City of Kansas City, Kan., 172 US 334 (1899).....4

DeStefano v Grabrian, 763 P.2d 275, 283-284 (Colo. 1988).....6

Guinn v The Church of Christ of Colinsville, 775 P.2d 766 (Okla. 1989).....6

L.L.N. v Clauder, 563 N.W.2d 434 (Wis. 1997).....6

Lemon v Kurtzman, 403 US 602 (1971).....9

Missouri v K.I. Ry. Co. v City of Loathe, 222 US 185 (1911).....4

Moses v Diocese of Colorado, 863 P.2d 310, 320-321 (Colo. 1993)6

Pope, et. al. v Atlantic Coast Line, 345 US 379 (1953).....4

Pritzlaff v Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995), *cert. den.*, __ U.S. __, 116 S.Ct. 920 (1996).....6

Roman Catholic Bishop of San Diego v Superior Court, 50 Cal.Rptr. 399, 405-406 (Cal.App.4 Dist. 1996).....8

STATUTES

28 U.S.C. 1257(a).....vii

McKinney's Consol. Laws of New York Civil Practice Law and Rules 5601(b) and (d) vi

McKinney's Consol. Law of New York Civil Practice Law and Rules 3211(a)(7) iv

CONSTITUTIONAL PROVISIONS

U.S. Constitution First Amendment 1

STATEMENT OF THE CASE

This case involves questions about the negligence of the petitioner and others for their acts in supervising an employee. The employee was a priest who had transferred from a diocese in Venezuela to petitioner and had worked at churches in Queens, N.Y.

The priest, Enrique Diaz Jimenez, who has defaulted in this action, sexually abused three young boys, plaintiffs-respondents herein. The priest pleaded guilty to criminal charges of sexual abuse involving the three boys.

The priest had transferred to the Brooklyn Diocese from the Archdiocese of Merida, Venezuela. The Archdiocese of Merida and Baltazar Porras Cardoza, the Bishop of the Venezuelan Diocese have defaulted in the action. The Brooklyn Diocese did not ordain the priest in hiring him, *i.e.* it did not confer a religious status upon him in hiring him. The priest already was ordained before he transferred to Petitioner. Upon information and belief, the Brooklyn Diocese did not remove any religious status in denying him permanent employment in the diocese. Upon information and belief, the priest remained a priest after his criminal convictions and return to Venezuela.

Plaintiffs-Respondents commenced this action and defendant-petitioner moved for dismissal for failure to state a cause of action pursuant to NY Civil Practice Law and Rules 3211(a)(7) arguing that the First Amendment of the United States

Constitution precludes holding a religious institution liable in hiring and supervising its employees and that plaintiffs-respondents' *respondeat superior* theories had no application. The trial court rendered a decision which dismissed some of plaintiffs' causes of action but allowed plaintiffs to proceed on theories of negligent hiring, negligent supervision, negligent retention and the mothers' derivative claims.

Petitioner appealed to the Supreme Court of the State of New York, Appellate Division, Second Department seeking review of the trial court decision upon the Federal constitutional grounds stated above. The Appellate Division, Second Department dismissed plaintiffs' negligence in hiring theory on non-constitutional grounds, but upheld plaintiffs-respondents theories of negligent supervision, negligent retention and the derivative claims.

Petitioner moved in the Appellate Division for reargument and in the alternative for leave to appeal to the state high court, the Court of Appeals, on their stated constitutional grounds. Respondents also moved in the Appellate Division for reargument or leave to appeal to the Court of Appeals on other non-constitutional grounds relating to the dismissal of the negligence in hiring cause of action. Both motions were denied. Plaintiffs-respondents moved directly to the Court of Appeals for leave to appeal on the negligence in hiring theory dismissed by the Appellate Division on non-constitutional grounds. Defendant-petitioner opposed plaintiffs-respondents motion to the New York high court arguing that the appeal could not be

time because the Appellate Division order was not final in state law terms and therefore not ready for review by the Court of Appeals. Plaintiffs-respondents motion is still pending.

REASONS FOR DENYING THE WRIT

A. Petitioner has not exhausted its remedies in State court and the interlocutory order of the Appellate Division, Second Department is not final in State or Federal Terms.

The order appealed from is an interlocutory order by an intermediate state court and is not a "final" decision. While it is true that petitioner cannot *now* proceed with an appeal to the highest court in the state because the Appellate Division order is not final under New York law, petitioner can still seek state high court review of all the constitutional issues at a later stage of proceedings.[1]

The lack of finality in state law terms is extremely important in this instance because of the nature of the Appellate Division order and in light of the current stage of the trial

---

[1] McKinney's Consol. Laws of New York Civil Practice Law and Rules 5601 (b) "**Constitutional Grounds.** An appeal may be taken to the court of appeals as of right: 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; ... (d) **Based upon nonfinal determination of the appellate division.** An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance, ... or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment or determination or award and which satisfies the requirements of ... paragraph one of subdivision (b) except that of finality."

proceedings. As was stated earlier, Petitioner's appeal arises from an order on its motion to dismiss plaintiffs' complaint for failure to state a cause of action. The Appellate Division order is a statement of first impression of New York common law and the ruling states that there is no broad constitutional impediment to proceeding upon a theories of negligent supervision and negligent retention. The ruling states that the defendant-petitioner does not have immunity from suit based upon the First Amendment. No New York court has yet applied this ruling to an actual trial or used it to decide upon any evidence. Petitioner's underlying pre-trial motion was made when only the most limited discovery had been had in this case. Thus this Court is being asked to decide the issues raised without any indication from the New York courts how this pre-trial, pre-deposition ruling will be applied and without any evidentiary presentation. And petitioner will have the opportunity to seek state high court review of all its constitutional issues, and any others which might arise at trial, when there is finality in state law terms.

As the order appealed from is not final and all petitioner's state high court avenues of review remain open, this case is not final in Federal terms either. *Missouri v K.I. Ry. Co. v City of Loathe,* 222 US 185 (1911); *Clark v City of Kansas City, Kan.*, 172 US 334 (1899); 28 U.S.C. 1257(a). Further, defendant-petitioner will have all the defenses available to it which are available to any other defendant in such a negligence case. *Pope, et. al. v Atlantic Coast Line*, 345 US 379 (1953).

Finally, petitioner will still have recourse to review by this Court when there is *finality* in the action. Petitioner's writ is a clear example of why there is a *finality* rule. After the matter has proceeded through state court it will be possible to see just what the state law means. At this juncture a court of review could only speculate on both the facts and the law of this case.

B. There is no conflict among the states on the question of the constitutionality of negligent supervision or retention.

The conflict among the states set forth by Petitioner is a chimera. Petitioner writes:

> There are now a number of state appellate court cases, including decisions from the highest courts of Colorado, Ohio, Oklahoma, and Wisconsin, which have reached conflicting decisions on whether, and under what circumstances, a church can be liable for negligently hiring or supervising its clergy. [Pet. 5]

First it should be noted that plaintiff-respondent has no remaining negligent hiring claim so the attempt to seek review based upon a perceived conflict among the states on negligent hiring of clergy issues is misplaced. The order appealed from did not reach the constitutional propriety of negligence in hiring of religious employees as it disposed of the negligence in hiring issue on other grounds. Second, on the issue of negligent supervision

petitioner cites six state cases none of which support its position. The Oklahoma Case cited[2] was an invasion of privacy case against the Elders of a church who continued a public campaign against the "sinfulness" of a former member even after that individual had left the church. That case was a Free Exercise case in which the Oklahoma Court rejected arguments that holding the Elders liable for their acts interfered with the Free Exercise of religion. The arguments presented by petitioner are not Free Exercise arguments, but instead are very different "excessive entanglement" arguments. The Oklahoma case has no relevance here. The Ohio case[3] dealt only with the issue of negligent hiring and imposed special pleading requirements in such cases and is also not relevant here. Again, Plaintiff-respondents have no negligence in hiring theory. The two Colorado cases cited[4] both allowed negligent supervision theories to proceed after review of the constitutional issues. In the two Wisconsin cases cited,[5] the Wisconsin Court did look upon negligent supervision against clergy with significantly greater skepticism than the did Colorado court, however, it did not set forth a *per se* rule barring such claims as violating the First Amendment. Instead the Wisconsin

---

[2] *Guinn v The Church of Christ of Colinsville,* 775 P.2d 766 (Okla. 1989).

[3] *Byrd v Faber,* 565 N.E.2d 584 (Ohio 1991).

[4] *DeStefano v Grabrian,* 763 P.2d 275, 283-284 (Colo. 1988) and *Moses v Diocese of Colorado,* 863 P.2d 310, 320-321 (Colo. 1993).

[5] *L.L.N. v Clauder,* 563 N.W.2d 434 (Wis. 1997) and *Pritzlaff v Archdiocese of Milwaukee,* 533 N.W.2d 780 (Wis. 1995), *cert. den.*, __ U.S. __, 116 S.Ct. 920 (1996).

court granted summary judgment in each case on First Amendment grounds based upon the kind of inquiry which the evidence specifically before those courts would have required. Thus no court cited by petitioners has held that the legal theory of negligent supervision when applied to clergy is *barred* by the First Amendment.

The differences between what the Wisconsin court did and what petitioner seeks here are important. The Appellate Division order was made upon a motion to dismiss for failure to state a cause of action. Petitioner is not asking this Court to rule on the constitutionality of any particular evidence actually before the Court as was done by the Wisconsin court, but is instead asking this Court to rule broadly that *any* sort of proof plaintiffs-respondents might present poses an insurmountable First Amendment hurdle. Petitioner seeks a broad grant of immunity to religious institutions reaching far beyond the scope of the First Amendment.

And petitioner overreaches in its argument that plaintiffs-respondents "main theory of liability is rooted in religious doctrine and governance". [Pet. 10] Plaintiffs-respondents main theory is that petitioner had reason to know it had an active pedophile among its employees and that its actions led to the immediate harm of the plaintiffs-respondents. But these are arguments best left, in the first instance, to a trial court. And if reviewable constitutional infirmities were to arise in the trial petitioner could have those errors reviewed at the State court level and again at the Federal level.

Petitioner also cites a seventh case, one from California,[6] which is again a negligence in hiring case, and one which petitioner discusses in a manner which unfairly conflates arguments made by the California plaintiff with those of respondents. Respondents have never made arguments like those used in the California court. Further, to the extent that plaintiffs-respondents had tried to make "agency" and "scope of employment" arguments about the "powers" given to priests in support of their *respondeat superior* causes of action in the complaint, they are now irrelevant as those *respondeat superior* theories have already been rejected by the New York courts.

C. Plaintiffs-Respondents Negligent Supervision claim relies upon rules of law which are neutral and of general application.

As was noted early in this discussion, petitioner hired the wayward priest and effectively fired him without ever reaching any issues relating to whether or not he should be a priest. The priest in question was ordained in Venezuela and transferred to New York. Whether or not petitioner is liable for its acts in supervising its employee should rest upon the facts presented to a court and not the mere incantation of the obvious fact that petitioner is a religious institution. Not every decision a religious institution makes is based upon religion. And not every rule that a religious institution has involves a religious belief or practice.

---

[6] *Roman Catholic Bishop of San Diego v Superior Court,* 50 Cal.Rptr. 399, 405-406 (Cal.App.4 Dist. 1996)

There are troubling implications to the kind of immunity petitioner seeks. If a church has two employees drive children on outings and both have accidents and both have similar known histories of alcohol problems then that church may well be liable for the accidents and injuries on grounds it negligent supervised its employees. But if one of those individuals is a clergyman and the other is a lay person, petitioner argues that even though both employees presented the same basic facts and circumstances, and both were subject to the same rules and law in the same way, the church should have immunity from suit on the clergyman.

Similarly, in a case of two pedophile teachers, with similar histories, teaching in adjacent classrooms in a religious school, petitioner wants immunity for the religious employer for its acts in relation to its clergyman. Surely neutral principals of law of general application can be applied in these instances without implicating the First Amendment. *Lemon v Kurtzman*, 403 US 602 (1971).

CONCLUSION

For all the reasons given above the petition should be denied.

Dated: October 9, 1997

Respectfully submitted,

KENNETH LITWACK
42-40 Bell Blvd., Suite 300
Bayside, N.Y. 11361

(718) 428 4806
Counsel for Respondents